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FAVORING JUDICIAL DISCRETION NOT TANTAMOUNT TO USHERING IN UNPREDICTABILITY: AN EXPLORATION OF THE CERCLA CIRCUIT SPLIT AND A LOOK AT HOW THE NINTH CIRCUIT SIDED CORRECTLY AMONG THE DIVIDE

*Lorran Hart Ferguson**

I. INTRODUCTION

When parties are responsible for causing contamination to sites by exposure to hazardous substances, pollutants, or contaminants, they are subject to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) or Superfund. This act was created and designed to facilitate the effective clean up of contaminated areas.¹ Frequently, several parties are responsible for environmental contamination sites.² In these instances, it is common for one party to undertake the cleanup efforts and then seek reimbursement from other liable parties.³

CERCLA states that the pro tanto approach should be used to allocate responsibility when government parties are liable in site contaminations.⁴ However, CERCLA is silent as to how amounts that are recovered in settlements among privately responsible parties (“PRPs”) should be credited against the total damages incurred. In order to function around this silence, courts

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¹ See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

² Michael D. Daneke, *9th Circ. Deepens Split Over Complex CERCLA Sites*, LAW360 (Apr. 22, 2015, 11:01 AM), <http://www.law360.com/articles/645836/9th-circ-deepens-split-over-complex-cercla-sites> [<https://perma.cc/VBW3-37C8>].

³ *Id.*

⁴ Barry M. Hartman et al., *Navigating CERCLA Settlements in an Age of Uncertainty: Fallout From Ameripride Services v. Texas Eastern Overseas*, 45 ENVTL. L. REP. 10846, 10850 (2015).

typically turn to two different approaches involving tort liability in order to determine allocation: the pro tanto approach and the proportionate share approach.⁵

For several years, the First and Seventh Circuits have been at odds regarding the proper settlement method when less than all jointly and severally liable parties have settled.⁶ The entrance of the Ninth Circuit this year has further deepened the already-established circuit split.⁷ The First and Ninth Circuits favor discretion for federal district courts in selecting the appropriate method of settlement credit, while the Seventh Circuit favors the pro tanto approach.⁸ Additionally, Texas Eastern Overseas, Inc.—the defendant in the case, which when decided by the Ninth Circuit injected that court into the discussion as an ally of the First Circuit—championed the proportionate share approach, which has yet to be adopted by any circuit.⁹

As the Supreme Court of the United States has yet to grant *certiorari* for a case of this nature, the circuit split is a notable issue that may only become more complicated in the coming years if the divide continues to grow and the Supreme Court continues to deny *certiorari*.¹⁰ The split hinges on one important question: which allocation method is most in-line with congressional intent and subsequently the appropriate compliment to the standards established by CERCLA? Ultimately, until the Supreme Court rules on the matter, it is important for settling parties to keep in mind that rules relating to settlement credits do differ from one jurisdiction to another.¹¹

Among the approaches presented by the different jurisdictions, the method adopted by the First and Ninth Circuits stands to have the most effective implementation. Their approach allows for judicial discretion to establish the most effective method of allocation in these often-complicated situations. Contrary to arguments by opponents, this method is also capable

⁵ *Id.*

⁶ *Id.*; see generally *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302 (7th Cir. 1999); *Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004).

⁷ *Hartman et al.*, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

of still creating a stable method for parties to assess their potential liability, as courts can hold pre-negotiation hearings to establish which method of allocation will be implemented in each specific case.

This note will discuss the Comprehensive Environmental Response, Compensation and Liability Act and will explore its functions in Section II. It will also explore the different methods of liability allocation, which different parties have viewed as the appropriate means of liability allocation for PRPs under the act, including the pro tanto approach and the proportionate share approach. Section III will discuss the current circuit split regarding multiparty liability in cleanup sites, and how the Seventh, Ninth, and First Circuit Courts of Appeals have ruled on the issue. Section III will also include the proposed method of allocation presented by Texas Eastern Overseas. Finally, Section IV will outline my recommended stance for courts to take in the future: the courts should view CERCLA's lack of explicit language governing instances involving private parties, as their intention to treat private parties differently from governmental parties whose actions are explicitly guided. In the future, courts should thus adopt the approach favored by the First and Ninth Circuit Courts.

II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

The Comprehensive Environmental Response, Compensation, and Liability Act was enacted in 1980, and provides a federal fund to clean up hazardous or abandoned sites, spills, or any related releases of contamination into the environment.¹² Due to the financial nature of CERCLA and the large monetary fund that it provides for cleanup purposes, it is often also referred to simply as "Superfund."¹³ The Environmental Protection Agency ("EPA") is authorized to implement CERCLA in all fifty states and has the authority to

¹² *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, EPA, <http://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (last visited Jan. 11, 2016) [<https://perma.cc/Z494-54GS>].

¹³ *Id.*

pursue responsible parties and force their cooperation in the cleanup processes.¹⁴

It is a common occurrence for multiple parties to be liable for portions of site contamination, and CERCLA imposes joint and several liability upon the parties responsible.¹⁵ The circuit split at issue concerns private parties' settlements at sites with multiparty liability as governed by the act.¹⁶ Typically, the EPA will target only one of the responsible parties, and that party will fund the work to repair the site at issue. CERCLA then authorizes that party to seek contribution from other liable parties for the costs incurred during remediation of the damage to the site at issue.¹⁷ The circuit split arises as courts have addressed situations where some of the responsible parties settle regarding their liability to the remediating party. Courts are then tasked with dividing the remaining liability among responsible parties who have yet to settle their share of the responsibility in relation to the site.¹⁸

Regarding the division of liability in situations involving PRPs, CERCLA "is silent with respect to how amounts recovered in settlements should be credited against the total damages," and courts are tasked with deciding which method of allocation of liabilities is most appropriate.¹⁹ The Seventh Circuit applies the pro tanto approach to allocation as outlined in the Uniform Contribution Among Tortfeasors Act ("UCATA").²⁰ The First and Ninth Circuits allow for judicial discretion in determining which method of allocation to apply. Additionally, some parties, including Texas Eastern Overseas, champion application of the proportionate share approach as established under the Uniform Comparative Fault Act ("UCFA").

¹⁴ *Id.*

¹⁵ See 42 U.S.C. § 9607 (2002); Hartman et al., *supra* note 4.

¹⁶ Hartman et al., *supra* note 4.

¹⁷ See 42 U.S.C. § 9607; Hartman et al., *supra* note 4.

¹⁸ Hartman et al., *supra* note 4.

¹⁹ *Id.*

²⁰ Lynn T. Manolopoulos, *Non-Settling CERCLA Defendants Beware: Ninth Circuit Provides Lower Courts with Discretion to Allocate Liability Using Equitable Factors*, ENERGY & ENVTL. L. BLOG (Apr. 15, 2015), <http://www.energyenvironmentallaw.com/2015/04/15/non-settling-cercla-defendants-beware-ninth-circuit-provides-lower-courts-with-discretion-to-allocate-liability-using-equitable-factors> [https://perma.cc/5B9T-FTBH].

A. The Pro Tanto Approach

The pro tanto approach is the method for settling the issues adopted by UCATA.²¹ Under UCATA, when an injured party settles with one or more other liable parties who are also responsible for the same contamination site, “the settlement does not discharge the non-settling tortfeasors, but reduces the injured party’s claims against them by the dollar value of the settlement.”²² Thus, under this approach, if a liable party settles for less than their share liability of the site contamination costs, in the end the non-settling parties will pay more than their proportionate share.²³ Said another way, under this approach, “[a] litigating defendant’s liability will frequently differ from its equitable share, because a settlement with one defendant for less than its equitable share requires the non-settling defendant to pay more than its share.”²⁴

This approach, in effect, encourages parties to settle early, whereas parties who do not settle early end up litigating over the portion of the total damages that have not been recovered through settlements.²⁵ Some scholars argue that this approach “creates an incentive for unfair or collusive settlements whereby parties settling early are left off the hook for much less than their relative share. This is because those costs can then be recovered from other non-settling parties later in litigation.”²⁶

Essentially, one fear concerning this approach is that the parties who settle first will have the incentive to not take their fair share of responsibility when accepting liability. Concerns arise, fearing that such parties will settle and consequently bar themselves from further liability, thus sometimes leaving the bulk of liability to other parties who arrive at the negotiating table at a later time. It is a concern that this approach, while encouraging early settlement, may also penalize parties who do take initiative to settle early but still fail to be the first party to settle.

²¹ *Id.*

²² *AmeriPride Servs. v. Tex. E. Overseas, Inc.*, 782 F.3d 474, 484 (9th Cir. 2015).

²³ *Id.*

²⁴ *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212 (1994).

²⁵ *Hartman et al.*, *supra* note 4.

²⁶ *Id.*

In order to combat issues regarding fair allocation of liabilities, some courts adopting the pro tanto approach mandate that parties partake in a "good faith hearing" prior to the approval of negotiated settlements to determine if the agreements reached allocate the fair share or responsibility to the settling party.²⁷

Under CERCLA, the pro tanto approach is required in settlements that involve government parties who share part of the liability for the damage or contamination of sites.²⁸ However, CERCLA does not explicitly extend this requirement for the use of the pro tanto approach to instances that involve only PRPs.²⁹

B. The Proportionate Share Approach

Another approach for determining the amount of parties' liabilities is the proportionate share approach, which was adopted by the UCFA.³⁰ Under this approach, the value of the injured party's claim against the remaining parties that share responsibility is "reduced not by the dollar amount of the settlement, but instead by the settling party's relative share of liability."³¹ Courts are required to determine the liability of the settled parties in relation to the non-settling parties when using the proportionate share approach, and then to subtract the proportional share from the total damages at issue in the case.³² Thus, this approach is not concerned with the actual settled amount.³³ Ultimately, this method protects non-settling parties in a way that the pro tanto approach does not.³⁴ While under the pro tanto approach, parties who do not settle or are the last to settle are sometimes strapped with more than their proportionate share of the costs, but under the proportionate share approach parties are only liable for their proportional share of the total damages at issue.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Manolopoulos, *supra* note 20.

³¹ Hartman et al., *supra* note 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

III. THE CIRCUIT SPLIT CONCERNING MULTIPARTY LIABILITY

A. *The Seventh Circuit's View*

The Seventh Circuit has set its own standard regarding the allocation of liability in multi-party cleanup sites. The court outlined its views regarding appropriate allocation in, *Akzo Nobel Coatings, Inc. v. Aigner Corp.*³⁵ Decided in 1999, the case resulted after Akzo Nobel Coatings, Inc. and the O'Brien Corporation (hereinafter "Akzo") sued Aigner Corporation, who according to the court, was standing in for approximately fifty other firms also responsible at the waste site.³⁶ At the time of the action, Aigner was responsible for a large portion of the cleanup activities on the site, which all parties involved in the suit, were somewhat responsible for.³⁷ Akzo had also performed some more minor cleanup work, but had only done so in the area of the site of which it conceded it was responsible for damage.³⁸

Akzo brought suit demanding that Aigner contribute to the cost of cleanup in the small portion of the cleanup site in which Akzo had assisted with cleanup efforts.³⁹ Aigner counterclaimed that Akzo should reimburse Aigner regarding the area for which Aigner had been primarily responsible.⁴⁰ The court ultimately ruled that Akzo was to compensate Aigner for 12.56 percent of the total efforts it would incur on the contamination site, consequently, rejecting Akzo's argument that Akzo was only responsible for a small part of the waste site and bore no responsibility for the burden of costs for any other site areas.⁴¹ In rejecting Akzo's argument, the district court concluded that it is impossible to track pollutants from their destinations back to their original sources in this particular waste site.⁴² The trial court ordered Akzo to pay an additional award of \$1.5 million dollars, equaling the sum equivalent to the costs incurred at the

³⁵ *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 304 (7th Cir. 1999).

³⁶ *Id.*

³⁷ *Id.* at 303-04.

³⁸ *Id.* at 303.

³⁹ *Id.* at 304.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

time of trial minus what Akzo had already spent.⁴³ Overall, Akzo generated about nine percent of the total solvents spilled on the site, yet the trial court ordered Akzo to pay Aigner for approximately thirteen percent of the total costs that Aigner had incurred or would incur in seeking completion of the cleanup.⁴⁴

Akzo then appealed the judgment to the United States Court of Appeals for the Seventh Circuit.⁴⁵ At the Seventh Circuit, Akzo asked the court to hold that it owed no damages to Aigner or related parties.⁴⁶ Akzo also contended that if it were in fact responsible for any portion of the costs, it should only be responsible for nine percent of the total cleanup costs, as Akzo was responsible for nine percent of the processed solvents that contaminated the site.⁴⁷

The district court held that the Uniform Comparative Fault Act required the court to disregard the responsibilities of non-parties when determining the total financial liabilities of parties involved in suits.⁴⁸ However, the Seventh Circuit rejected this idea. The court felt that it would create a process in which the party who initially agreed to take the case could essentially turn a large profit on the spill site, or that if the party who took initial responsibility were capped and prohibited from profiting, then the other parties would not share their fair proportion of liability.⁴⁹

The court gives what it asserts as a simple example of the idea championed by the lower court by stating the following:

Suppose Firm A is responsible for 40% of the pollutants, Firm B for 10%, and Firm C for 50%. Firm A agrees with the EPA to perform the cleanup and sues B for contribution. On the district court's reading of the UCFA, B must pay 20% of the total cleanup costs, because B sent 20% of the pollutants that A and B generated jointly.⁵⁰

⁴³ *Id.*

⁴⁴ *Id.* at 305.

⁴⁵ *See id.* at 304.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 306.

⁴⁹ *Id.*

⁵⁰ *Id.*

The court continues to explain that C is never factored into this equation; the fact that C is able to pay its share, and does pay its share, is never considered.⁵¹ If C does pay its full fifty percent share, then A will only bear thirty percent of the burden of contamination costs, while they are responsible for forty percent of the pollutants.⁵² Thus, the court concluded that by being the original party to agree to take control of the cleanup efforts in multiparty contamination litigation a party has the potential to make a profit from its efforts, if the statute is read in light of the district court's view.⁵³ The Seventh Circuit rejected the trial court's choice of the UCFA's proportional share approach as the appropriate method of allocation.⁵⁴

The Seventh Circuit also rejected the argument presented by Akzo.⁵⁵ Akzo asserted that the UCFA requires a "global assessment" by the district court; thus, Akzo is not required to pay anything until all shares of liability are determined.⁵⁶ The court found issues with this method because it would take years to resolve.⁵⁷ Akzo further asserted that it could pay its nine percent and then be free from further liability, as this was the total amount for which it was responsible.⁵⁸ The court also rejected this argument, as it fails to consider the outcome for some parties if other responsible parties backed out. For example, Aigner and similarly situated parties would be strapped with responsibility far exceeding their proportion, all because they took initiative in helping to guide the cleanup process.⁵⁹

The court considered, but rejected, the plan of allocation established under UCFA and instead favored the pro tanto approach as the appropriate method of allocating responsibility in these situations.⁶⁰ This pro tanto approach is the same one already in use for claims arising involving government parties

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

under §113(f)(2) of CERCLA.⁶¹ The court stated, "Extending the pro tanto approach of §113(f)(2) to claims under §113(f)(1) enables the district court to avoid what could be a complex and unproductive inquiry into the responsibility of missing parties."⁶²

Thus, ultimately, the Seventh Circuit Court of Appeals ruled that district courts are required to use the pro tanto approach.⁶³ This approach creates several implications for both settling and non-settling parties, including parties with only a small portion of liability that may now face collateral attacks from other responsible parties. While this approach opens the possibility of collateral attacks by other parties, there is a sense of stability that is presented in the Seventh Circuit's approach. It is possible that parties may be sued by others under this method, but the parties facing potential litigation will at least know that the possibility of suit is present and will be prepared to take appropriate action. The Seventh Circuit concluded that the district court must determine the total amount Aigner collected from third parties in settlements, and then required Akzo to pay 12.56 percent of that total amount recovered.⁶⁴ Additionally, this total must be "reduced not only by collections Aigner has realized to date, but also by future third-party payments."⁶⁵

Under the First and Ninth Circuit's view, the parties could still be subjected to the pro tanto approach if the court deems it appropriate. While both sides of the split could reach an outcome that applies the pro tanto approach, the Seventh Circuit's view provides the ability of parties to always know they will function under the pro tanto method, rather than face an uncertain method of allocation. Thus, the Seventh Circuit has created a bright-line rule.

It is also important to note that only parties who have a small portion of liability may face these collateral attacks.⁶⁶ This is a positive implication of the Seventh Circuit's approach: only some parties experience the ultimate uncertainty that is a known possibility.⁶⁷ A negative outcome, however, is that parties that

⁶¹ *Id.*

⁶² *Id.*

⁶³ Hartman et al., *supra* note 4.

⁶⁴ *Akzo*, 197 F.3d at 308.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Hartman et al., *supra* note 4.

did not greatly contribute to site contamination may be saddled with additional lawsuits. While this approach may not subject major parties to collateral lawsuits, it does not afford smaller parties the same protection.⁶⁸

B. The First and Ninth Circuits' View

The First and Ninth Circuits have ruled similarly to one another regarding the allocation of liability in multiparty cleanup sites.⁶⁹ These two circuits have granted discretion to district courts, allowing them to apply the method strategy that they find “equitable in the circumstances” of each case.⁷⁰ Discretion is given to the courts to decide whether to apply the pro tanto approach, the proportionate share approach, or another judicially selected approach.⁷¹

The Ninth Circuit addressed this issue in its 2015 ruling in *AmeriPride Services, Inc. v. Texas Eastern Overseas, Inc.*⁷² In that case, the court ruled that under CERCLA § 113(f)(1), courts have discretion to determine, based on the facts of each specific case, which method is most appropriate.⁷³ In deciding which approach to implement in *AmeriPride*, the Ninth Circuit considered what effect the settlement by a portion of responsible parties would have on the liability of non-settling responsible parties.⁷⁴

The Ninth Circuit also instructed the lower court to “allocate response costs among liable parties using such equitable factors as the court determines appropriate.”⁷⁵

AmeriPride concerned the Ninth Circuit’s review of the lower court’s ruling determining if the methods for calculating and allocating responsibility under CERCLA were correct.⁷⁶ The case arose concerning the contamination of groundwater and soil in Sacramento, California.⁷⁷ The contaminated site was originally

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *AmeriPride Servs. v. Tex. E. Overseas, Inc.*, 782 F.3d 474 (9th Cir. 2015).

⁷³ *Id.*

⁷⁴ Daneker, *supra* note 2.

⁷⁵ *AmeriPride*, 782 F.3d at 486.

⁷⁶ *Id.* at 479.

⁷⁷ *Id.* at 480.

owned by Valley Industrial Services, Inc. ("VIS"), but was later purchased by AmeriPride while also having several other owners take possession of the land between their respective ownerships. During its ownership of the site, VIS released the hazardous substance perchloroethylene ("PCE"), which it used in its dry cleaning operations, into the environment. Eventually, Texas Eastern merged with VIS and, in doing so, assumed the liabilities of VIS.

Once AmeriPride took on ownership of the location, more water contaminated with PCE was released into the groundwater and soil. The contamination at the site owned by AmeriPride eventually moved into neighboring grounds and led to the contamination of groundwater wells owned by the California-American Water Company.⁷⁸ AmeriPride ultimately reported their findings of contamination, and eventually the state gained control of the site's investigation.⁷⁹ Once under state supervision, AmeriPride continued to investigate the hazardous situation and took steps to remediate the contamination of the groundwater and soil surrounding the site.⁸⁰

In 2000, AmeriPride sued Texas Eastern, VIS, and two other companies in district court in an attempt to recover the costs corresponding to the contamination resulting from the release of PCE.⁸¹ The two other parties settled with AmeriPride, while Texas Eastern filed a counterclaim on behalf of its interests as owner of both itself and VIS.⁸² Additionally, the parties in neighboring locations, California-American Water Company, and Huhtamaki Foodservices, Inc., both sought recovery from AmeriPride for their costs incurred while responding to the contamination and additional, related damages.⁸³ AmeriPride eventually settled with both California-American Water and Huhtamaki Foodservices for \$2 million and \$8.25 million, respectively.⁸⁴

⁷⁸ *Id.* at 480-81.

⁷⁹ *Id.* at 481.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Prior to trial, the district court held that Texas Eastern was liable for AmeriPride's response costs.⁸⁵ It also concluded that the settlement costs AmeriPride incurred when settling with the other two parties involved were not encompassed under the statute it originally cited but that AmeriPride's complaint could be amended to include request of recovery of these costs from Texas Eastern under a different section of CERCLA.⁸⁶

After trial, the district court concluded that TEO was liable to AmeriPride.⁸⁷ It found that AmeriPride had incurred \$15,508,912 worth of damages that could be equitably apportioned between AmeriPride and Texas Eastern.⁸⁸ To reach this number, the court totaled AmeriPride's response costs and then deducted the total amounts paid in the settlements by the other parties.⁸⁹ Under this formula, the \$18,758,912 total response costs were then reduced by the \$3.25 million AmeriPride received as a result of settling claims with the other two parties, making the total cost \$15,508,912.⁹⁰ The district court then divided this amount equally between AmeriPride and Texas Eastern.⁹¹

Texas Eastern Overseas ultimately sought review by the Ninth Circuit and asserted four arguments on appeal.⁹² The first section of Texas Eastern's argument was the most relevant to this topic. It asserted that the higher court should find fault in the method chosen by the lower court to determine the allocation of liability among the parties involved.⁹³ The Ninth Circuit ultimately reviewed the statute under a *de novo* standard of review.⁹⁴

The court considered whether it would be appropriate to apply federal common law to determine the appropriate interpretation of the statute at hand.⁹⁵ They ultimately concluded that it could not "read federal common law into a statute if [they]

⁸⁵ *Id.* at 482.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 479.

⁹³ *Id.*

⁹⁴ *Id.* at 483.

⁹⁵ *Id.* at 485-86.

determine[d] it [was] contrary to congressional intent.”⁹⁶ The court then explained that before it reaches the point of applying federal common law, it is first important to determine if Congress has answered the question at issue.⁹⁷ The court importantly referred to a prior ruling with regards to CERCLA, while it “presume[s] the application of well-established common law principles to a federal statute, this presumption does not apply ‘when a statutory purpose to the contrary is evident.’”⁹⁸ Congressional intent, it concluded, can be deduced from the language of the statute, the structure of the statute, the relationship that is present between the provisions of the statute, and the overall purpose of the statute.⁹⁹

With regard to the statutory language in question with CERCLA, the Ninth Circuit concluded that the statute for settlements involving only private, potentially responsible parties failed to specify the appropriate allocation method. Congress did not intend to impose a uniform requirement in such situations and instead desired to give the courts involved greater discretion.¹⁰⁰ The court pointed out that there were specific provisions of CERCLA, which stated that the pro tanto approach must be used in situations involving government parties, and that lack of such a provision concerning PRPs meant that Congress did not intend to apply solely the pro tanto approach to those situations.¹⁰¹

In its decision, the Ninth Circuit heavily relied on the First Circuit’s ruling in *Cyanamid Co. v. Capuano*, thus creating the faction of the two courts on the side favoring judicial discretion in these proceedings.¹⁰² As the Ninth Circuit aligned with the First Circuit, the court also specifically rejected the ruling by the Seventh Circuit in *Akzo Nobel Coatings*, which further broadened the circuit divide.¹⁰³

⁹⁶ *Id.* at 485.

⁹⁷ *Id.* at 486-87.

⁹⁸ *Id.* at 486 (citing *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 958 (9th Cir. 2013) (quoting *United States v. Tex.*, 507 U.S. 529, 534, (1993))).

⁹⁹ *Id.* (citing *Chubb*, 710 F.3d at 960-61).

¹⁰⁰ Manolopoulos, *supra* note 20.

¹⁰¹ *Id.*

¹⁰² Hartman et al., *supra* note 4; *Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004).

¹⁰³ Hartman et al., *supra* note 4.

Cyanamid concerned the American Cyanamid Company (“Cyanamid”) and Rohm and Haas Company (“R&H”) versus Daniel J. Capuano, Jr., Jack Capuano, and United States Sanitation, Inc., and Capuano Enterprises. Cyanamid and R&H disposed of hazardous waste and then sought judgment against others who were involved with the cleanup site.¹⁰⁴ The issue began when Warren Picillo and his wife agreed to allow a portion of their pig farm to be used for disposal of “drummed and bulk waste.”¹⁰⁵ Within a year’s time, thousands of barrels of waste cumulated at the site and eventually caused a giant explosion that spread throughout the entire farm. The flames lasted for days and caused Rhode Island authorities to investigate the situation. Upon investigation, they uncovered “large trenches and pits filled with free-flowing, multi-colored, pungent liquid wastes.”¹⁰⁶ Rhode Island, with the help of the federal government, initiated a clean up of the area.¹⁰⁷

Rhode Island brought an action against thirty-five defendants in 1983 under CERCLA to recover cleanup costs at the contamination site.¹⁰⁸ These thirty-five defendants included parties who owned or operated the site or allegedly produced, transported, or scheduled transportation of waste to the Picillo’s farm.¹⁰⁹ Twenty of the defendants settled with the state, including the Capuano brothers, who settled their portion for \$500,000. Rhode Island then proceeded to seek judgment against five of the remaining defendants in trial.¹¹⁰ Among these five defendants was R&H.¹¹¹ The district court concluded that R&H, as well as two of the other companies sued as defendants at trial, were jointly and severally liable for \$991,937 in costs, which had yet to be reimbursed along with the total future costs of removal or remediation that would be incurred by the state.¹¹²

R&H later brought a contribution action against the Capuanos and fifty-one other PRPs seeking reimbursement for

¹⁰⁴ See *Cyanamid*, 381 F.3d at 9.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Violet v. Picillo*, 648 F. Supp. 1283, 1286 (D.R.I. 1986)).

¹⁰⁷ *Id.* at 9.

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

past and future response costs.¹¹³ The district court ultimately concluded that the Capuanos were liable for one hundred percent of the waste deposited at the Picillo farm.¹¹⁴ Additionally, it concluded that the Capuanos were “liable for a share of the waste dumped at the Picillo site as arrangers [and] liable as transporters for 7.94 percent of the total waste delivered” to the location.¹¹⁵ The trial court also found that R&H was liable for 3.23 percent of the waste.¹¹⁶

When the district court determined the proper allocation of liability among responsible parties, the court did not look at the fault of non-parties to the suit as the parties present in the suit failed to present evidence to the court concerning these non-parties’ liability.¹¹⁷ The Capuanos appealed arguing that the district court was incapable of determining the proper allocation of costs unless it weighed the shares of all PRPs, even if some of them were non-parties without evidence presented against them.¹¹⁸

The district court applied the pro tanto approach, and subtracted the \$382,807 that R&H received via settlements, and concluded that R&H paid a total of \$4,253,918 to the federal government for cleanup expenses.¹¹⁹ As the court had already concluded that R&H’s liability at the site was 3.23 percent, it determined R&H’s total liability was \$1,602,080.¹²⁰ This then left the Capuano’s liable for \$2,651,838, which was the total amount, which R&H paid beyond their share of contamination liability.¹²¹ The Capuano brothers then argued that the lower court was incorrect in determining their liability. Instead, the court should have determined the amounts based on a pro-rata share of liability among the PRPs who had settled, instead of taking R&H’s costs and subtracting the amount R&H was truly responsible for in order to determine Capuano’s costs.¹²²

¹¹³ *Id.* at 11.

¹¹⁴ *Id.* at 18.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 19-20.

¹²² *Id.* at 20.

Upon review, the First Circuit concluded that CERCLA permits private parties “to seek contribution from non-settling parties, but unlike a settlement with the United States or a state, CERCLA does not instruct a court as to how a settlement agreement between two private parties affects the contribution of liability of non-settling parties.”¹²³ Instead, the First Circuit determined that CERCLA permits the lower courts to allocate liability among responsible parties via factors the lower court sees as equitable.¹²⁴ The First Circuit views the provisions of CERCLA applicable to PRPs to mean that the district courts have been given discretion to choose which method they deem most appropriate in accounting for parties who have or are settling.¹²⁵

While the First Circuit does not conclude that the *pro tanto* approach is the required method of application, it ultimately concluded that the district court was permitted to allow this form of allocation.¹²⁶ It stated “[w]e believe the district court did not abuse its discretion by applying the *pro tanto* approach given the *circumstances of this case*” (emphasis added).¹²⁷ Its reference to the “circumstances of this case” further represents its view that the lower court has the ability to choose the appropriate method in light of the facts of each case.

C. Texas Eastern Overseas’s Proposed Allocation Method

In the Ninth Circuit Case, Texas Eastern Overseas argued that the court should formulate an entirely new rule from those developed in the Seventh or First Circuits. This approach championed by Texas Eastern Overseas would apply the proportionate share method of allocation in instances where CERCLA is not explicit as to what approach should be applied.¹²⁸

This approach removes the incentive for parties to settle early and for less than their share of liability for the specific site contamination.¹²⁹ Here, the value of the injured party’s claim against the other parties that are responsible is reduced by the

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ Hartman et al., *supra* note 4, at 10847.

¹²⁸ *Id.* at 10849.

¹²⁹ *Id.*

settling party's relative share of the responsibility, not the dollar amount of the settlement.¹³⁰ One negative aspect to this proposed approach is that under this method the party who originally undertakes the responsibility of remediation would face an increased burden.

D. The Future of the Circuit Split Over CERCLA and Its Allocation Methods

As of today, the United State Supreme Court has yet to grant *certiorari* to hear this issue. With two courts siding on one side of the issue, another court ruling in a different way, and several other possible outcomes that could still be applied, it is most likely that the court will eventually grant *certiorari* to settle this issue and establish a more uniform plan of allocation in contamination sites.

In the future, if the Supreme Court does grant *certiorari*, there are several ways it could rule on the issue. The high court could favor the approach followed by the Ninth and First Circuits, which provides courts with more flexibility, as it allows the court to apply the approach they deem most appropriate for each situation.¹³¹ It is also possible that the Supreme Court would adopt a rule that allows only one method of allocation. Under this type of approach, it could adopt the rule of the Seventh Circuit and apply the *pro tanto* approach or they could adopt the recommended plan of Texas Eastern Overseas and apply the proportionate share approach.¹³²

IV. RECOMMENDED OUTCOME

If the United States Supreme Court were to grant *certiorari*, it would benefit future parties if it implemented the approach adopted by the First and Ninth Circuits. The statutory language argument of the Ninth Circuit is persuasive. It is essentially an assertion of *expressio unius est exclusion alterius*, or the idea that if one class is explicitly mentioned, those not included were purposefully excluded. Likewise, the court

¹³⁰ *Id.* at 10850.

¹³¹ Hartman et al., *supra* note 4.

¹³² *See id.*

reasoned that because CERCLA established explicit guidelines for allocation involving government parties, but fails to provide any guidelines for allocation involving PRPs, Congress likely desired to not establish a uniform guideline for situations with PRPs.¹³³ Thus, if Congress had sought to establish a specific standard for situations involving PRPs, then they would have established these guidelines as they did in other situations.¹³⁴

It is also true that these situations concerning site cleanup can be very complicated. There are sometimes hundreds of liable parties involved. Circumstances will also arise when only a few parties will be involved. Due to the fact that these instances differ from case to case, and priorities and needs will change depending on the number of parties involved or the difficulty of cleaning up the site, it can be very helpful for the court to be able to tailor their approach towards each specific situation. It is evident from the three cases arising in this instance that there are an unlimited number of fact patterns that could arise under this statute's governing power, each of which may have different needs to be addressed by courts.

Opponents of this approach may argue that the lack of predictability and consistency across jurisdictions could lead to chaos in settlements. However, pre-negotiation hearings to establish which approach will be used in each specific case could provide stability in each instance.

V. CONCLUSION

Ultimately, this legal problem is one that will not evaporate on its own overtime. As time progresses, it will become more likely that other United States Circuit Courts will need to weigh in on this issues presented. If the divide continues, it will best be resolved by a United States Supreme Court decision outlining a clear vision for how this statute is intended to operate. The high court will undoubtedly consider all the possibilities available for interpretation of the statute. It is important that in order to preserve legislative authority, the Supreme Court should side with the Ninth and First Circuits,

¹³³ Manolopoulos, *supra* note 20.

¹³⁴ *See id.*

and establish a uniform method of allocation that looks to the clear intent of the statute itself. Hopefully, the court will view the omission of an explicit standard for situations involving PRPs, when paired with the inclusion of a standard for governmental parties, as a purposeful omission. Granting the courts the discretion to choose which approach is most appropriate for each situation will create a system where the complex clean up processes and parties taking responsibility for them will receive treatment best tailored to their specific situation.¹³⁵ While some would argue that a standard rule could be an effective approach in this instance, it is also important to note that in complicated situations concerning the clean up of hazardous sites, situations may be handled more effectively if courts are able to choose the allocation process based on the type and number of parties involved.

¹³⁵ Hartman et al., *supra* note 4, at 10850.